

**Sri Awad Pengangkutan Enterprise Sdn Bhd v Petronas
Dagangan Bhd & Anor** A

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–1259 OF 2009 B
AZIMAH OMAR JC
22 APRIL 2015

*Contract — Agency — Principal and agent — Whether principal-agent C
relationship existed between defendants — Whether defendants not responsible for
termination of plaintiff's services agreement which was done by independent
contractor unrelated to defendants — Whether plaintiff's cause of action, if any,
was against independent contractor and not against defendants — Whether
plaintiff failed to prove existence of agreement for supply of tankers to defendants D*

The plaintiff claimed damages against the defendants for alleged breaches of two agreements. First, it claimed the defendants were responsible for wrongly and prematurely terminating an agreement ('the Sri Awad agreement') under which the plaintiff transported bulk petroleum for the first defendant ('PDB'). E
Secondly, the plaintiff claimed the defendants' alleged failure to accept and pay for tankers they had caused the plaintiff to place orders for had caused it losses. The plaintiff did not execute any agreement or contract directly with PDB but only with the second defendant ('KLB'). However, it sought to make PDB jointly liable for the alleged breaches by contending that KLB had at all F
material times acted as PDB's agent and that even when KLB's role in the Sri Awad agreement was taken over by another entity, MISC Integrated Logistics Sdn Bhd ('MILS'), the latter had also acted as PDB's agent. The termination of the Sri Awad agreement came about following the involvement of the plaintiff's tankers in two road accidents. The first accident, caused by the G
negligence of the plaintiff's driver, resulted in fatalities while the second resulted in the loss of a huge volume of PDB's petroleum. On account of the accidents, MILS, which, by that time, had replaced KLB in the Sri Awad agreement, suspended the plaintiff's services but agreed to lift the suspension if the plaintiff agreed to comply with certain conditions. As the plaintiff was not H
willing to comply, MILS issued a notice terminating the plaintiff's services under the Sri Awad agreement. With regard to the alleged agreement for the plaintiff to supply tankers, the plaintiff contended that at KLB's request, it placed orders for the manufacture of tankers but the defendants' subsequent refusal to accept or pay for them caused it loss. I

Held, dismissing the plaintiff's claims:

- (1) Based on all the evidence, the submissions of the parties and the contemporaneous documents, the court found there was never in

- A existence at any time a principal-agent relationship between the defendants. The plaintiff could never have apprehended that KLB was PDB's agent or that PDB was the principal in the Sri Awad agreement. The mass of evidence was exceptionally overwhelming to indicate that all parties were in total and common understanding that KLB was never an agent of PDB. The plaintiff could not now go against that state of understanding (see paras 73–75).
- B
- (2) A plain reading of both the Sri Awad and KLB agreements denoted that the creation of a principal-agent relationship was never intended. Consequently, as KLB was never an agent of PDB, the plaintiff had clearly never entered into any contract with PDB, especially the Sri Awad agreement. Thus any breaches relating to the Sri Awad agreement (if any) were by no means attributable to PDB (see paras 76–78).
- C
- (3) The contemporaneous documents together with the express conduct of the plaintiff drew the compelling conclusion that MILS was never an agent of PDB at all material times and was a mere independent contractor of PDB. The plaintiff had conducted itself in the business with this understanding and also with the understanding that MILS was at all times a valid replacement to KLB. The plaintiff was estopped from denying this state of understanding. It was also the court's view that MILS was rightfully appointed to replace KLB (see paras 107–109 & 130–132).
- D
- E
- (4) With the court's finding that MILS was not PDB's agent and was merely an independent contractor; that MILS was validly appointed to replace KLB and that KLB's services were validly terminated, even assuming there was any breach of the Sri Awad agreement, by no means could that breach be attributable to any of the defendants. It was MILS which suspended and terminated the plaintiff's services in its own stead. Thus any breach of the Sri Awad agreement was the personal liability of MILS and not, at any time, the liability of the defendants. The plaintiff had sued the wrong parties in this action. The failure to bring MILS as a party to the dispute was fatal to the plaintiff's case (see paras 133–137).
- F
- G
- (5) The plaintiff had failed to prove the existence of any agreement for the supply of tankers. The testimonies and contemporaneous evidence divulged the undeniable conclusion that the plaintiff itself had rejected and cancelled KLB's offer. Thus, there was no agreement to begin with. The plaintiff was estopped from denying the fact that the plaintiff itself had rejected the offer letter and had never entered into any agreement with KLB (see paras 175–177).
- H
- I

[Bahasa Malaysia summary]

Plaintif menuntut ganti rugi terhadap defendan-defendan kerana didakwa melanggar dua perjanjian. Pertama, plaintif mendakwa defendan bertanggungjawab kerana dengan salah dan secara pramatang menamatkan satu perjanjian ('perjanjian Sri Awad') di mana plaintif mengangkut petroleum secara pukal untuk defendan pertama ('PDB'). Kedua, plaintif menuntut kegagalan defendan yang didakwa untuk menerima dan membayar bagi kapal tangki mereka telah menyebabkan plaintif membuat pesanan yang menyebabkan kerugian kepadanya. Plaintif tidak memasuki apa-apa perjanjian atau kontrak secara langsung dengan PDB tetapi hanya dengan defendan kedua ('KLB'). Walau bagaimanapun, plaintif cuba untuk menjadikan PDB turut sama bertanggung ke atas pelanggaran yang didakwa dengan menegaskan bahawa KLB telah, pada semua masa material bertindak sebagai ejen PDB dan bahawa walaupun peranan KLB dalam perjanjian Sri Awad telah diambilalih oleh entiti yang lain, MISC Integrated Logistics Sdn Bhd ('MILS') dan MILS juga telah bertindak sebagai ejen PDB. Penamatan perjanjian Sri Awad timbul ekoran penglibatan kapal tangki plaintif dalam dua kemalangan jalan raya. Kemalangan pertama, disebabkan oleh kecuaiannya pemandu plaintif, menyebabkan kematian manakala yang kedua menyebabkan kehilangan jumlah yang besar petroleum PDB. Berdasarkan kemalangan tersebut, MILS, yang pada masa tersebut, menggantikan KLB dalam perjanjian Sri Awad, menggantung perkhidmatan plaintif tetapi bersetuju untuk menarik balik penggantungan sekiranya plaintif bersetuju untuk mematuhi syarat-syarat tertentu. Memandangkan plaintif enggan mematuhi, MILS mengeluarkan notis menamatkan perkhidmatan plaintif di bawah perjanjian Sri Awad. Berhubung dengan perjanjian yang didakwa kepada plaintif untuk membekalkan kapal tangki, plaintif menegaskan bahawa atas permintaan KLB, plaintif membuat pesanan untuk pembuatan kapal tangki tetapi keengganan defendan-defendan untuk menerima atau membayar untuk mereka menyebabkan kerugiannya.

Diputuskan, menolak tuntutan plaintif:

- (1) Berdasarkan semua keterangan, hujahan pihak-pihak dan dokumen-dokumen semasa, mahkamah mendapati tidak pernah wujud pada bila-bila masa hubungan prinsipal-ejen antara defendan-defendan. Plaintif tidak boleh menahan bahawa KLB adalah ejen PDB atau PDB merupakan prinsipal dalam perjanjian Sri Awad. Keterangan keseluruhan secara nyata memberatkan untuk menunjukkan bahawa semua pihak secara amnya dalam pemahaman bahawa KLB tidak pernah menjadi ejen kepada PDB. Sekarang ini plaintif tidak boleh menentang keadaan pemahaman tersebut (lihat perenggan 73–75).
- (2) Bacaan nyata kedua-dua perjanjian Sri Awad dan KLB menandakan bahawa penciptaan hubungan prinsipal-ejen tidak pernah dimaksudkan.

- A** Sehubungan dengan itu, memandangkan KLB tidak pernah menjadi ejen PDB, plaintif dengan jelas tidak pernah menandatangani apa-apa kontrak dengan PDB, terutamanya perjanjian Sri Awad. Oleh itu apa-apa pelanggaran yang berkaitan dengan perjanjian Sri Awad (jika ada) adalah tidak sama sekali boleh dikaitkan dengan PDB (lihat perenggan 76–78).
- B**
- (3) Dokumen-dokumen semasa bersama dengan tindakan nyata plaintif melakar kesimpulan menarik bahawa MILS tidak pernah menjadi ejen PDB pada setiap masa material dan hanya merupakan kontraktor bebas PDB. Plaintif telah menjalankan perniagaannya sendiri bersama dengan pemahaman ini dan juga dengan pemahaman bahawa MILS adalah pada setiap masa merupakan pengganti yang sah untuk KLB. Plaintif diestop daripada menafikan keadaan pemahaman ini. Mahkamah juga berpandangan bahawa MILS dengan tepat dilantik menggantikan KLB (lihat perenggan 107–109 & 130–132).
- C**
- D**
- (4) Dengan dapatan mahkamah bahawa MILS bukanlah ejen PDB dan hanya seorang kontraktor bebas; bahawa MILS telah dilantik secara sah untuk menggantikan KLB dan perkhidmatan KLB secara sah telah ditamatkan, walaupun dengan mengandaikan terdapat pelanggaran perjanjian Sri Awad, pelanggaran itu sama sekali tidak boleh dikaitkan dengan mana-mana defendan. MILS yang menggantung dan menamatkan perkhidmatan plaintif dalam kedudukan sendiri. Oleh itu apa-apa pelanggaran perjanjian Sri Awad merupakan liabiliti peribadi MILS dan tidak, pada bila-bila masa, merupakan liabiliti defendan. Plaintif telah menyaman pihak yang salah dalam tindakan ini. Kegagalan untuk membawa MILS sebagai satu pihak kepada pertikaian tersebut menjejaskan kes plaintif (lihat perenggan 133–137).
- E**
- F**
- (5) Plaintif telah gagal membuktikan kewujudan apa-apa perjanjian untuk membekalkan kapal tangki. Keterangan dan bukti semasa yang didedahkan membawa kepada kesimpulan yang tidak dapat dinafikan bahawa plaintif sendiri yang menolak dan membatalkan tawaran KLB. Oleh itu, tiada perjanjian sejak awal lagi. Plaintif diestop daripada menafikan fakta bahawa plaintif sendiri yang menolak surat tawaran dan tidak pernah memasuki apa-apa perjanjian dengan KLB (lihat perenggan 175–177).]
- G**
- H**

Notes

For cases on principal and agent, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3229–3236.

I

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] 1 QB 84, CA (refd)

- Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, FC (folld) A
- Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236 (folld)
- Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, CA (folld)
- Marzaini bte Zainuddin v Majlis Peguam Negara* [2007] 8 MLJ 697, HC (distd) B
- Ng Ben Thong & Ors v Krishnan a/l Arumugam* [1998] 5 MLJ 579, HC (folld)
- Oriental & Motolite Marketing Corp v Syarikat Asia Bateri Sdn Bhd* [2012] 5 MLJ 87, HC (folld) C

Legislation referred to

Evidence Act 1950 s 73A

- Ramesh Sivakumar (Ramesh & Loo) and Avtar Singh (Amarjeet Singh with him) (Avtar Singh) for the plaintiff.* D
- Faizal Moideen (Max Tai and Aloysius Susek with him) (Moideen & Max) for the first defendant.*
- Arthur Wang Ming Wey (Arthur Wang Lian & Assoc) for the second defendant.*

Azimah Omar JC: E

[1] The plaintiff (Sri Awad Pengangkutan Enterprise Sdn Bhd) is a private limited company carrying on the business of Liquefied Petroleum Gas ('LPG') haulage and transport services. F

[2] The first defendant (Petronas Dagangan Bhd) is a company in the business of marketing, trading and distributing petroleum products including Liquefied Petroleum Gas ('LPG') for Petronas. G

[3] The second defendant ('Konsortium Logistik Bhd') is a company which provides haulage and delivery services.

[4] The case herein from the outset is a claim for damages arising from a breach of contract. Primarily, the plaintiff in its amended statement claim ('A1') claims against the first and second defendants ('the defendants') for a sum of RM17,864,168 or any other amount to be assessed by this court and also a further sum of RM3,825,000 allegedly suffered by the plaintiff arising from the defendants' breach of contract. H

[5] The plaintiff's pleaded case is this; under the first cause of action, the first defendant and second defendant had allegedly wrongfully terminated the plaintiff's services and that there was a fundamental breach of the main agreement entered between the plaintiff and the first defendant. Under the I

A second cause of action, the plaintiff claims from both the defendants for damages arising from an alleged failure to accept eight units of road tankers and failure to pay for the usage of two units from the eight tanker units.

B [6] There is only one contract which forms the fulcrum of the plaintiff's claims against the defendants in respect of the plaintiff's first cause of action. That of which being *the contract dated 1 October 2003* ('Sri Awad agreement') which signatories to the contract were the second defendant and the plaintiff whereby the second defendant had contracted to provide transportation services to the plaintiff.

C [7] The second defendant then allegedly was replaced by MISC Integrated Logistics Sdn Bhd ('MILS') who took over the second defendant's role and standing in the Sri Awad agreement.

D [8] Albeit that there are other contracts which remain relevant to this dispute (which will be discussed further in this judgment) it is vehemently clear that the breaches so alleged by the plaintiff heavily gravitates to the Sri Awad agreement (regarding the first cause of action).

E [9] The first defendant, alongside the Sri Awad agreement, placed reliance on a preceding contract dated *15 August 2003* which signatories were the defendants. ('KLB agreement') whereby the second defendant was appointed as the first defendant's transportation manager to provide transportation services to the first defendant. It is abundantly clear from cl 4.6(e) of the KLB agreement that the second defendant as transportation manager is merely an independent contractor and at no point in time shall be deemed as employees or agents of the first defendant.

G [10] The nexus between the two contracts above is that the first defendant decided to outsource its transportation needs and appoint specialised independent transportation managers to manage the transportation of the first defendant's petroleum and/or petroleum products under the KLB agreement.

H The plaintiff was one of the contractors and road tankers enlisted in the KLB agreement (Bundle H1, p 170).

I [11] Subsequently, the second defendant had entered into the Sri Awad agreement to provide transportation services to enable the second defendant to manage and fulfil the transportation needs of the first defendant.

[12] The above brief facts roughly culminate the plaintiff's alleged first cause of action under the Sri Awad agreement.

[13] On the second alleged cause of action of plaintiff, the plaintiff claims that it has entered into an agreement with the second defendant, alternatively the first defendant as principal, where it was allegedly agreed that the plaintiff shall supply tankers to the defendants. The plaintiff claims that the defendants' rejection and refusal to pay for the said tankers is a breach of this alleged agreement.

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B

[14] It must be noted that from the outset, there are no contemporaneous contract and/or agreement that was physically signed between the first defendant and the plaintiff.

C

[15] The manner in which the plaintiff purports to link the first defendant to the alleged breaches is that the second defendant had entered into the Sri Awad agreement as an agent of the first defendant. The plaintiff also alternatively, purports to link MILS to the first defendant as its agent and therefore are liable as principal to MILS's breach(es) (if any).

D

[16] The breaches alleged are argued by the plaintiff to be universally linked to both the defendants. The plaintiff pins the breaches against the second defendant as signatory and contracting party of the Sri Awad agreement. On the other hand, the plaintiff hinges the breaches against the first defendant in the sense that they are the actual principal to the contract. All throughout the trial and submissions, the plaintiff had tenuously argued that the first defendant is a party of the Sri Awad agreement by way of principal-agent relationship as principal to either the second defendant or MILS or even both.

E

F

[17] The breaches under the Sri Awad agreement forms the first alleged cause of action of the plaintiff. Briefly, the breaches under the Sri Awad agreement alleged by the plaintiff against the defendants are:

G

- (a) the defendants have prematurely terminated the contract against cl 6 of the Sri Awad agreement which the plaintiff alleges that the contract period was a minimum of eight years; and
- (b) the defendants have wrongfully terminated the Sri Awad agreement upon MISC's alleged unlawful termination of the Sri Awad agreement.

H

[18] While on the second alleged cause of action, the plaintiff alleges the following breach against the defendants:

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- (a) the defendants have breached an alleged agreement for the supply of tankers which consequently had led to the plaintiff's losses and also default of a hire purchase agreement entered into between the plaintiff and MIDE.

A [19] Now, in determining the present dispute, the court finds that the following are the material issues to be discussed.

(19.1) In respect of the first cause of action:

- B**
- (a) whether the second defendant an agent to the first Defendant?
 - (b) whether the first defendant a party to the Sri Awad agreement as principal?
 - (c) was there a breach of the Sri Awad agreement by the defendants when the plaintiff's services were suspended and terminated?

C (19.2) In respect of the second cause of action

- (a) was there a contract of supply of tankers between the defendants and the plaintiff?
 - (b) was there a breach of the alleged contract of supply of tankers by the defendants?
- D**

E [20] The court will directly discuss the parties' position and/or arguments and evidence forwarded in respect of each of the issues enunciated above and thereafter makes a finding of all those issues before making a decision determining this present dispute.

ISSUES (a) AND (b) OF THE FIRST CAUSE OF ACTION SHALL BE DEALT TOGETHER

F [21] This first issue is immensely relevant to the dispute as it is the sole thread of nexus which the plaintiff intends to draw against the first defendant. The hypothesis is simple. If the first defendant is the principal of the second defendant, then the first defendant is read into the Sri Awad agreement which the first defendant is not a signatory to.

G [22] The plaintiff have at length argued and submitted evidences in proving such principal-agent relationship between the defendants.

H [23] Before the court delves into the masses of evidences in this regard, the court would address the evidences submitted by the plaintiff which are the pleadings and sworn testimonies of the witnesses called during trial. It is peculiar to note that the plaintiff instead of submitting on any real documentary evidence supporting their contention had tenuously submitted on other extrinsic evidences outside of the contracts relevant to the dispute.

I [24] It is also noted that the plaintiff's submission in proving this essential contention is surprisingly brief in contrast of the voluminous testimony and evidences which was put to the test in the court. In fact, in contrast to the first

defendant's comprehensive submissions, covering a large extent of the trial, the plaintiff have in a way abandoned much of its own contention and have left much of the first defendant's submission uncontested in the plaintiff's own reply against the first defendant's submission. This will be further addressed in this judgment.

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THE PLAINTIFF'S RELIANCE ON THE TERM PRINCIPAL IN THE SRI AWAD AGREEMENT

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[25] The court intends to address the most significant documentary evidence to which all parties have relied onto. That of which are the KLB agreement and the Sri Awad agreement.

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[26] The plaintiff's submission on the Sri Awad agreement briefly is that the Sri Awad agreement mentions of the first defendant as a principal and therefore is the actual contracting party to the Sri Awad agreement with the plaintiff. The plaintiff's stand is that it was understood by the parties, at the time the Sri Awad agreement was entered into, that the first defendant is the principal whilst the second defendant is merely the agent of the first defendant. The plaintiff submits that the Sri Awad agreement's term was already clear and should be read to its natural meaning

D

E

[27] However, in the same Sri Awad agreement, it is noteworthy that the first defendant pointed out that the agreement has never defined which party is the agent. In fact, this agreement never defined any party as an agent.

F

[28] Furthermore, against the plaintiff's contention, a plain further reading of the Sri Awad agreement would instead not reflect any principal-agent relationship. The plaintiff at length had submitted, in reference to the notes of evidence, that the plaintiff's witness, Dr Awad, was at pains to draw the first defendant into the Sri Awad agreement in respect of payments under the Sri Awad agreement. And the court concurs. The witness was swerving left and right to avoid admitting the plain written terms of the contract. If the plaintiff intends to submit on the strict interpretation of the contract, they are also bound to strict interpretation of terms which are not in their favour. This court draws its attention to cl 7.3 and 7.5 of the Sri Awad agreement and the notes of evidence Vol 2, pp 30–33. Clause 7.3 clearly states that the party paying the services of the plaintiff is the second defendant, and not at any time the first defendant. The relevant portion of cl 7.3 is reproduced below:

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... in the event that after *payment has been made by the company to the contractor* ...

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[29] It is clear here that even the terms of the Sri Awad agreement do not support the creation of principal-agent relationship. It is devoid of any reconciliation and support that the plaintiff could reasonably apprehend that

A there is any such relationship, when in plain words, the plaintiff knew that the first defendant does not pay them for its services. It is the second defendant.

B [30] In fact, against the alleged reasonable assumption by the plaintiff, there is a barrage of oral and documentary evidences put forth in the court which defeats such contention. In fact, Dr Awad in his testimony in fact readily admitted that the second defendant was an independent contractor. These evidences are addressed as follows.

C TERMS IN THE KLB AGREEMENT

[31] The KLB agreement clearly stipulates that the second defendant is merely an independent contractor as per cl 4.6(e). For the sake of convenience, the clause is reproduced below (see Bundle H(1), p 17):

D *The Main Contractor is an independent contractor and neither the Main Contractor nor its employees, servants and agents shall be deemed to the employees or agents of the Company.*

E [32] The term ‘main contractor’ was already defined earlier in the KLB agreement to be the second defendant while ‘company’ refers to the first defendant.

F [33] From the outset, the second defendant has no standing to represent the first defendant as principal. The meaning of ‘principal’ ascribed in the Sri Awad agreement cannot have been intended to take the meaning of a principal in an agent-principal relationship, as it is already blatantly clear that the second defendant knows and was fully aware that they are not agent to the first defendant and are merely independent contractors.

G [34] The plaintiff against the KLB agreement in the course of trial has argued that the second defendant had held out the first defendant as the principal. However, contemporaneous documents and testimonies indicate otherwise. There is no basis merely because the plaintiff is not privy to the terms of the KLB agreement that the plaintiff may reasonably assume or apprehend that the first defendant was its principal. The ground behind this preliminary finding is well-founded.

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THE PLAINTIFF’S INCORRECT/MISCONCEIVED
INTERPRETATION OF CLAUSE 4.6(e)

I [35] It is also noted that the plaintiff had forwarded its own interpretation of the clause. However, it must be understood that the interpretation afforded by the plaintiff in their reply submissions against the first defendant’s submission was on cl 4.6(e) of the Sri Awad agreement and *NOT the KLB agreement* (which

was the submission of the first defendant):

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15.2 Similarly, the reference to clause 4 that deals with employment of labour (and the sub-clause 4.6 thereto), has no relevance on the proper construction thereof and also has no relevance to the plaintiff's dealings with the 1st defendant as the principal (see pages 212 to 214 of Bundle B1) (Emphasis added.)

B

[36] Pages 212–214 of Bundle B1 are the pages where cl 4.6(e) of the Sri Awad agreement is contained. *NOT the KLB agreement.*

[37] The plaintiff is seemingly confused to the dispute at hand. On the other hand, based on the interpretation of Sri Awad agreement's clause above, the plaintiff suddenly sought to defeat *paras 103–104 of the first defendant's submission. (Which refers to KLB agreement's cl 4.6(e) and NOT Sri Awad agreement's clause):*

C

103. Now if were to look at *Clause 4.6(e) of the said KLB Agreement...*

D

104. *It would necessarily follow that the 2nd Defendant cannot also than be an 'Agent' of the 1st Defendant in the context of the Sri Awad Agreement as the creation of an agency has been expressly excluded by virtue of Clause 4.6(e) of the KLB Agreement.*

E

[38] This contention shall fail as the plaintiff cannot equate a totally different clause to the clause which was referred to by the first defendant. The two clauses are entirely different. Thus, it follows that even the literal interpretation of the two clauses would definitely differ.

F

[39] Clause 4.6(e) of the KLB agreement stipulates (*difference is in bold, in brackets, italicised and underlined*):

The (*Main*) Contractor is an independent contractor and neither the (*Main*) Contractor nor its employees, servants and agents shall be deemed to be the employees or agents of the Company.

G

[40] Clause 4.6(e) of the Sri Awad agreement omits and deletes the word 'main' above.

H

[41] The clause in the KLB agreement makes an explicit reference to a 'main contractor' which was defined in the same KLB agreement to be the second defendant.

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[42] There is absolutely no reason or justification to instead ascribe the interpretation of the clause in the Sri Awad agreement into the clause in the KLB agreement.

A [43] This contention by the plaintiff does absolutely no damage against the submission of the first defendant.

THE PLAINTIFF'S OBJECTION ON CLAUSE 4.6(e) BEING UNPLEADED

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[44] The plaintiff had submitted that the first defendant ought not to be allowed to refer to cl 4.6(e) on the ground that it was unpleaded. However, the court disagrees with the plaintiff in this contention. It was already pleaded by the first defendant the KLB agreement and the assertion that the second defendant at all material times were never the first defendant's agents and are merely their independent contractors.

C

D [45] It was already contended by the first defendant in their pleading that they intend to prove that the second defendant was merely independent contractors. Any facts in support of that assertion are merely evidence which need not be pleaded. The relevant paragraph is reproduced as follows:

6. The 1st Defendant contends and will contend that the relevant background facts in respect of this matter are as follows: ...

E

(d) Sometime on or about 15.8.2003, the 1st Defendant entered in an agreement with KLB, wherein the 1st Defendant appointed KLB as one of its Transportation Managers to provide road transportation services to the 1st Defendant (hereinafter referred to as 'the KLB Agreement').

F

(e) The 1st Defendant contends and will contend that the KLB was and is at all material times an independent contractor and at no time was it appointed as an agent of the 1st Defendant.

THE PLAINTIFF'S ADMISSION ON THE SECOND DEFENDANT'S POSITION AS AN INDEPENDENT CONTRACTOR UNDER THE KLB AGREEMENT

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H [46] In fact, Dr Awad himself, the plaintiff's main witness has admitted that the second defendant is indeed an independent contractor as per cl 4.6(e) of the KLB agreement. The relevant portion of the evidence can be found in Vol 2, p 29 which is reproduced below:

MFM: The Plaintiff is actually an independent contractor based on this clause.

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AWAD: Yes.

THE PLAINTIFF NEVER WROTE TO CLARIFY ON THE PARTIES' POSITION UNDER THE SRI AWAD AGREEMENT

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[47] The plaintiff knowingly entering the Sri Awad agreement, that the term 'agent' was never defined, and also to the fact that cl 7.3 of the agreement, it is the second defendant is the party who pays for their services, it was admitted by Dr Awad that the plaintiff had never at any point in time, written to any of the defendants to clarify on the second defendant's position as an agent or the first defendant as principal. Fully aware of the nature of the contract, the plaintiff had never put a single effort in finding certainty of its own alleged understanding of the agreement. The court refers to the notes of evidence Vol 1, p 32 reproduced below:

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C

FMD: Yes, just please answer my question. Now is there any letters from the Plaintiff before this court, where the Plaintiff wrote to the First Defendant Petronas Dagangan Berhad, confirming that indeed the Second Defendant is an agent and has authority to enter into this contract with the Plaintiff?

D

AWAD: No, I don't have.

THE PLAINTIFF ADMITS THAT THEY WERE MERELY SUBCONTRACTORS

E

[48] Not only that the plaintiff has never enquired of it, but in fact, the plaintiff themselves even admitted to the understanding that they were mere subcontractors.

F

FMD: Dr Awad, this letter was sent by KLB to Sri Awad, clearly referring Sri Awad the plaintiff herein as a subcontractor. Not once, twice in the second last paragraph. My question is, did you at least at this point write to KLB to clarify their position vis a vis their contract with Petronas Dagangan Berhad? They just called you a subcontractor.

G

AWAD: No I didn't write.

FMD: Did you at this point write to Petronas Dagangan Berhad to clarify KLB's position; whether they were an agent or a main contractor?

H

AWAD: No I didn't write.

[49] There was a string of correspondences in which referred the plaintiff as a subcontractor and not even once the plaintiff has come out and objected against it. All the four letters by the second defendant dated 21 November 2007, in pp 24–27 of Bundle B(2) contain the following paragraph:

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Merujuk kepada perkara diatas dan keputusan mesyuarat pada 27 September 2007 adalah dimaklumkan bahawa sub-kontraktor KLB iaitu Sri Awad Sdn Bhd ...

A [50] The plaintiff made no effort to object to them being referred to as subcontractors.

 [51] It is clear that even the second defendant understood that the plaintiff is merely a subcontractor.

B

 [52] The array of compelling evidences against the plaintiff's contention does not end here. This court will discuss these evidences as follows:

C (i) *Claims procedure for examination service rendered*

 [53] Dr Awad under cross-examination admitted that claims for payment was directed to the second defendant and the claims were never copied to the first defendant. This is clear in reference to the letters and supporting documents that the claims were made against the second defendant was the same was never copied to the first defendant.

D

 MFM: OK. And you told us that this document has been sent to KLB. Now look at it. Was this copied to my client? The First Defendant.

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 AWAD: No.

 MFM: And this is how the submission is made for KLB to process the payment to the Plaintiff, correct?

 AWAD: Yes.

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 MFM: Yes. And you produced this as an example as to how payments are effected between the parties, correct?

 Awad: Yes.

G (ii) *Reliance on averments in second defendants affidavit as evidence*

 [54] The plaintiff had submitted that the first defendant's witness, DW1 had acknowledged the second defendant's affidavit averring that the first defendant is the principal to its agent, the second defendant. However, there is not a single shred of reference to the notes of evidence forwarded by the plaintiff in their submission in proving such acknowledgment by DW1.

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 [55] The first defendant in their reply submissions has addressed this reliance by the plaintiff. Peculiarly enough, albeit that the plaintiff's main contention is the existence of the alleged principal-agent relationship, neither the plaintiff nor the second defendant have ever called the maker or deponent of the affidavit to testify in court. We are inclined to agree with the first defendant that the veracity of such cardinal evidence must be allowed to be tested. There were no reasons at all afforded by the plaintiff on its failure to call the deponent

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of the affidavit to testify on the affidavit. There was also no proof that the plaintiff at all made any effort, to its diligence to call the deponent of the affidavit. Be that as it may, the second defendant was denied of their application to call the deponent as witness subsequent to their choice not to offer evidence, there is nothing at all that restrains the plaintiff itself to call the deponent to testify on the affidavit (of which the plaintiff itself is relying onto). In fact, it was even admitted in the plaintiff's reply submission against the first defendant's submission that the plaintiff itself had objected against the second defendant's application to call the deponent to testify. It is verily peculiar how the plaintiff intends to rely on the affidavit but at the same time it is also against the idea of the deponent to testify on the same piece of evidence that the plaintiff relies upon. This is clearly an afterthought.

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[56] Furthermore, this court finds that the submission of the plaintiff in its reply that the first defendant's failure to call the deponent of the affidavit to disprove the averments is fatal to their case totally erroneous. It is trite law that 'he who asserts must prove'. The onus to proof lies on the plaintiff to prove such relationship. There is no basis at all that the onus has shifted to the first defendant to disprove an assertion which was not yet proven by the plaintiff. It is the plaintiff who asserts the relationship, then the burden lies onto the plaintiff to put forth all the relevant evidence to prove its assertion (inclusive of the affidavit relied upon, which the plaintiff has not). If the plaintiff itself did not forward such evidence, then at no point in time, the defendant bears a burden to disprove. There was no failure at all on the part of the first defendant. Instead, there was a failure on the part of the plaintiff to call the deponent to testify in court. It is plain and simple. The party who asserts must prove. Which in this case, it is the plaintiff who must prove its assertion.

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[57] This court is guided by the decision of Winslow J in the case of *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236 which reads:

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I accordingly find that the plaintiff have not discharged the burden of proving a case against the defendant at the first place.

No burden accordingly shifts to the defendant ... the defendant would not have to disprove something which has not been proved against him. (Emphasis added.)

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[58] Moreover, this court is guided by the recent decision of the High Court in the case of *Oriental & Motolite Marketing Corp v Syarikat Asia Bateri Sdn Bhd* [2012] 5 MLJ 87, paras 29–31:

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[29] Before I proceed further, I will deal with a preliminary objection raised by the defendant's counsel. In this regard, the defendant argued that the court cannot consider as evidence the affidavit of *Minguel v Pingol* (exh P3) and the affidavit of *Roberto v Garcia* (exh P4) submitted by the plaintiff through PW2 as this is contrary to s 73 of the Evidence Act. In relation to this, the plaintiff contended that:

A Section 73A of the Evidence Act 1950 which provides an exception to the rule that evidence must be tendered through a person who is called as a witness in the proceedings as follows:

73A Admissibility of documentary evidence in civil cases etc

B (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:

C (a) if the maker of the statement either:

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) ...

D And

(b) if the maker of the statement is called as a witness in the proceedings:

E (ii) Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

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[30] In this present case, both these witnesses were overseas in the Philippines and have deposed in their affidavits that they could not come at short notice to give evidence in person, due to the late amendment to the defendant's statement of defence two weeks before the trial.

G [31] In the light of the above reasons, I am satisfied that the pre-requisites in s 73A of the Evidence Act as to the admission of these affidavits of *Roberto v Garcia*, marked exh P4 and the affidavit of *Miguel v Pingol*, marked exh P3 have been fulfilled in accordance with s 73A of the Evidence Act and they can be taken into account as part of the evidence before this court.

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[59] In the present case however, there is nothing at all submitted by the plaintiff to satisfy any of the exceptions under s 73A of the Evidence Act 1950. In fact the plaintiff itself objected on the application to call the deponent to testify on the affidavit.

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[60] Hence, it is the court's view that the court ought not to simply admit such averments in the affidavit to be conclusive evidence that there was indeed a principal-agent relationship between the defendants.

(iii) *Reliance on the second defendant's pleadings as evidence to prove principal-agent relationship*

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[61] The plaintiff further attempts to prove such relationship from an alleged 'admission' of the second defendant of being the first defendant's agent. Against this contention, the court from the outset would deem this contention fallible. It is not the law that mere pleadings are readily available to be deemed as conclusive evidence to a certain assertion. In fact, pleadings are supposed to be mainly factual with minimal evidences. This is on the trite understanding that even pleadings need be substantiated later in trial.

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[62] The plaintiff had referred to the case of *Marzaini bte Zainuddin v Majlis Peguam Negara* [2007] 8 MLJ 697 in supporting its contention. However, a plain reading of the case reveals that the case is clearly distinguishable to the present case. In *Marzaini's* case, the admission referred to in the case is an admission by a solicitor on the account of misconduct which was made during the disciplinary board hearing. At no point in time the case was referring to pleadings as an admission. It is too far-fetched to equate a pleading to be an admission binding against the party admitting. Marzaini's admission during the disciplinary board hearing is indeed evidence. However, it is trite law that mere pleadings are NOT evidence. The court is guided by the case which was referred to by the first defendant, *Ng Ben Thong & Ors v Krishnan all Arumugam* [1998] 5 MLJ 579:

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Pleadings is (sic) not evidence. It is a bare averment of a party's case. The party has to adduce evidence to substantiate its pleadings. Whilst pleadings cannot become evidence in the absence of evidence being led in court, similarly evidence cannot be led outside pleadings.

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[63] In fact, the case is distinguishable in another aspect. In *Marzaini*, an admission was effected against the person who made the admission and not against another party. This is utterly incoherent with the present case. What the plaintiff purports to draw is that the supposed admission by the second defendant is equally enforceable against the first defendant who did not make such admission.

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[64] Thus, it is this court's judgment that the plaintiff's reliance upon the second defendant's pleadings as an evidence of admission, cannot and will not stand.

(iv) *Alleged direct correspondences*

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[65] The next piece of evidence that the plaintiff relies upon in their submission is the supposed direct correspondence that the plaintiff has with the first defendant. Now, it must be noted that the plaintiff, has by their own

- A submission, narrowed these alleged correspondences only to one letter of termination by MILS dated 18 July 2008 (see Bundle B1, pp 63–64). And this position taken by the plaintiff is consistent even in its reply against the first defendant’s submission. There are no other letters referred to by the plaintiff in attempting to prove the alleged principal-agent relationship to bind the Sri
- B Awad agreement against the first defendant. It seems that the plaintiff opted to abandon all other letters mentioned in their own statement of claim in para 7(b). Even after the first defendant has addressed those letters in their submission, the plaintiff never took liberty to answer to their submissions. These letters submitted by the first defendant shall be addressed later in this
- C judgment. This court shall first address to this sole letter referred to in the plaintiff’s submission.

(a) MILS termination letter dated 18 July 2008

- D [66] The 18 July 2008 letter is the termination letter by MILS to the plaintiff. Indeed the content of the letter did refer the first defendant as a principal. And on this basis the plaintiff submits that it is the parties’ common understanding that the first defendant is the principal. The counsel for the
- E plaintiff further submitted that, in fact the letter was never replied by the first defendant albeit being copied the letter.

- [67] Now against this contention, as had been discussed in the numerous findings above, there is no justification at all that the plaintiff may apprehend
- F that the first defendant is a principal. Although being referred to as a principal in this letter, it is overwhelmingly compelling that the parties (especially the plaintiff and second defendant) have already understood, in full awareness that the first defendant is not in any point in time a principal.

- G [68] Furthermore, the court agrees with the first defendants reply submissions against the plaintiff’s submissions that there is no reason at all for the first defendant to reply the letter as it was never directed to the first defendant. It was merely copied to them.

- H (b) First defendants letter calling for the registration of all transportation operators dated 23 November 2007

- I [69] This is one of the letters which was referred to in the plaintiff’s own pleading and was also not at all submitted in its submission. It is peculiar to note that the plaintiff themselves are unconvinced by their own pleading that they opt to abandon the contention in their submission. And even in the plaintiff’s reply to the first defendant’s submission, after the first defendant had addressed the letter, the plaintiff had never made any contention against it.

[70] The first defendant's letter dated 23 November 2007 at Bundle B(1), p 40 is a letter calling for all of the first defendant's transportation operators to register with the first defendant which was sent to the plaintiff. The plaintiff took this letter as an evidence to prove direct correspondence with them in consequently proving the alleged direct relationship as principal. However, the court is in agreement with the submission of the first defendant which is more plausible. A plain reading of the letter is sufficient to reveal that the letter was addressed not just to the plaintiff, but to all transportation operators. The opening of the letter reads:

Kepada semua Kontraktor Perkhidmatan Pengangkutan Pukal Bahan-bahan Petroleum di Semenanjung, Sabah dan Sarawak.

[71] Regarding the above, the first defendant's witness, SD1 has testified the following evidence which was never challenged during cross-examination:

A: As I said earlier, the 1st Defendant's letters to the Plaintiff were nothing more than replying to the Plaintiff's Letters which were directly issued to the 1st Defendant. In addition, some of the letters were not written to the Plaintiff directly. For example the 1st Defendant's letter dated 23.11.2007 at p 40 of BOD, Part A, marked as B-1, was not specifically addressed to the Plaintiff but was addressed to all transportation operators (both contractors and subcontractors) of the 1st Defendant. In this connection the 1st Defendant had asked all its transportation operators, whether directly or indirectly having business with the 1st Defendant to register with PETRONAS. The registration of the 1st Defendant's contractors and subcontractors do not automatically create a contractual relationship between the 1st Defendant and them but is merely for identification, security and administrative purposes, as these subcontractors in carrying out their role would invariably enter the 1st Defendant's premises for loading of products etc.

[72] Thus, this letter cannot at all be considered as any evidence to prove direct business relations or principal-agent relationship to deem the first defendant a principal in the Sri Awad agreement.

The court's findings

[73] In cognisance of all the aforementioned evidences and submissions by the parties, the court finds that there is never in existence at any material times, a principal-agent relationship between the defendants. Clearly in contrasting and analysing the testimony of the witnesses and the contemporaneous documents discussed above, the plaintiff could have never apprehended that the second defendant is the first defendant's agent and the first defendant is the principal in the Sri Awad agreement. The court is guided by the Court of Appeal decision in the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook*

A *Chin & Anor* [2003] 2 MLJ 97:

A Judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence of a witness. *He must when deciding whether to accept or reject the evidence of a witness, test it against relevant criteria.* Thus, he must take into account the presence or absence of a motive that a witness may have in giving his evidence. *If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against probabilities of the case.* A trier of fact who makes findings based purely upon demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. (Emphasis added.)

D [74] The mass of evidence discussed above is exceptionally overwhelming to indicate all parties are in total and common understanding, that in any correspondences and/or contracts, that the second defendant is never an agent of the first defendant. It was even admitted by the plaintiff's own witness, Dr Awad himself that he recognises the second defendant as an independent contractor.

E [75] And in this *common understanding*, specifically the plaintiff, who had no reason to apprehend that the second defendant was the agent to the first defendant is fully aware that the first defendant is not the principal in the Sri Awad agreement. Thus, the plaintiff cannot now go against that state of understanding. The court is guided by the case referred to by the first defendant where the Federal Court in the case of *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 had referred to Lord Denning's decision in the case of *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84 which reads:

The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at p 122) as follows:

H The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with case. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted

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the dealings between them – neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so. A

[76] Furthermore, a plain reading of both the Sri Awad and KLB agreements would denote that there was never intended a formation or creation of principal-agent relationship. B

[77] Consequently, as the second defendant was never an agent of the first defendant, it is vividly clear that the plaintiff had never entered into any contract with the first defendant, especially the Sri Awad agreement. C

[78] Thus, any breaches against the Sri Awad agreement (if any) are by no means attributable to the first defendant.

ISSUE (c) OF THE FIRST CAUSE OF ACTION WAS THERE A BREACH OF THE SRI AWAD AGREEMENT BY THE DEFENDANTS WHEN THE PLAINTIFFS SERVICES WERE SUSPENDED AND TERMINATED? D

[79] The court finds that it is imperative to delve further into the background underlying MILS's involvement in the dispute. E

Further background

[80] It was alleged that MILS sometime or about 31 January 2008 had taken over the second defendant's position and role as transportation manager. However, the plaintiff submits that at no point in time had the plaintiff agreed or acknowledged the replacement. F

[81] The said withdrawal of the second defendant and the appointment of MILS had been informed by the first defendant to the plaintiff via the first defendant's letter dated 30 January 2008 ('appointment letter') (Bundle B1, p 395). G

[82] In furtherance of this replacement, the first defendant entered into another contract with MILS on 11 July 2008 ('MILS agreement') which is similar to the KLB agreement (see Bundle B5, pp 272–433). H

[83] The plaintiff's tankers in pursuant to the Sri Awad agreement had met with two road accidents. The first accident being on 2 April 2008 carries fatal consequences and claimed the lives of two motorists including a four year old child. The second accident on 12 June 2008 has resulted in the spillage of approximately 14,560 liters of the first defendant's Primax 3 petroleum product. I

- A – see *Bundle B4*, p 157 for the *incident notification form of the 2 April 2008 accident*
- see *Bundle B5*, p 229 for the *incident summary of the 12 June 2008 accident*.
- B (It must be noted that the plaintiff never contended and/or disputed against the occurrence and details of the accidents).
- C [84] As a result of the first and second accidents (‘the accidents’) MILS had suspended the plaintiff’s services via their letter dated 13 June 2008 (see *Bundle B1*, p 398).
- D [85] In response to the accidents a meeting was conducted to discuss, inter alia, the suspension of the plaintiff’s services on 4 July 2008 (see *Bundle B1*, pp 56–58).
- E [86] In furtherance of the meeting held above, MILS wrote to the plaintiff that it considers uplifting the suspension subject to the compliance of four conditions by the plaintiff (see MILS’s letter dated 7 July 2008 at *Bundle B1*, p 59). The four conditions being:
- F (1) Enforce full implementation of GPD of PDB’s choice, complete with testing and submission of relevant report;
- (2) Attend Safety Passport refresher training for all drivers;
- (3) Comply to the requirement for road parking at MILS central parking; and
- (4) Implement a salary scheme as determined in Attachment 1 hereof.
- G [87] Thereafter, in reply to MILS’s letter dated 7 July 2008 above, the plaintiff expressed in their letter dated 11 July 2008 that they were unable to comply with the conditions (see *Bundle B2*, pp 30–31).
- H [88] Consequently, through a letter termination letter dated 18 July 2008 MILS had furnished notice of termination of the plaintiff’s services due to the plaintiff’s inability to comply with the conditions imposed above (see *Bundle B1*, p 63):
- I With your inability to adhere to the condition requested by us, we see that you are no longer interested to continue with the services. As such, we hereby serve you notice that your services as the transporter of bulk petroleum for PDB is no longer required.
- [89] However, it must be noted that even in the plaintiff’s own submissions, that it is not disputed that the termination was conducted by MILS themselves.

Only that, it was argued further by the plaintiff, that the termination was done on the pretense that it was consented and directed by the first defendant. A

[90] The alleged breaches of the Sri Awad agreement claimed by the plaintiff are as follows: B

- (a) there was no notice of termination of the Sri Awad agreement by the second defendant as provided under cl 8.1, 8.2 and 8.3 of the Sri Awad agreement (see Bundle B1, pp 217–219). Thus, allegedly the Sri Awad agreement remains subsisting; C
- (b) there was no justification for the termination of the Sri Awad agreement by the defendants; D
- (c) the termination made by MILS through their termination letter is a wrongful termination as MILS has no rights under the Sri Awad agreement to terminate the agreement; E
- (d) although the first defendant has appointed MILS to replace the second defendant, the plaintiff has never entered into any contract with MILS; and
- (e) the defendants has breached cl 6 of the Sri Awad agreement as the minimum contractual period of eight years was not adhered to. F

[91] Now, before the court addresses each of the above breaches alleged, there are two preliminary issues under this cause of action that is essential to be determined: F

- (a) is MILS an agent to the first defendant? and
- (b) was MILS the second defendant's valid replacement as transportation manager subsequent to the second defendant's withdrawal? G

Is MILS an agent to the first defendant?

[92] It is the submission of the plaintiff that the termination of the Sri Awad agreement was conducted by MILS as agent of the first defendant. From the outset, this court totally disagrees with this contention. There is an abundance of evidence which indicates that MILS is merely an independent contractor and it was in the knowledge and awareness of the plaintiff that MILS is not agent of the plaintiff. H

[93] First and foremost, the MILS agreement contains the same provision as the KLB agreement. Specifically cl 4.6(f) of the MILS agreement is of the same construction of cl 4.6(e) of the KLB agreement: I

A The Contractor is an independent contractor and neither the Contractor nor its Driver(s), employees, servants and agents shall be deemed to be the employees or agents of the Company.

B [94] The company being defined as the first defendant and contractor to be MILS (see section 1 of the MILS agreement at Bundle B5, p 280).

[95] Thus, echoing the same finding earlier, it is already clear from the MILS agreement that MILS is merely an independent contractor.

C OTHER EVIDENCES

D [96] Now, by and large, against the plaintiff's contention that MILS is an agent of the first defendant, and that the appointment of MILS is invalid, what transpired in court reveals that the plaintiff is in dire straits to draw this agency relationship.

E [97] Even the plaintiff's own submission after full trial only has a fleeting statement that the termination letter by MILS was issued on the direction and consent of the first defendant. And that was the only argument made in the submission. The plaintiff seemingly opted to not address the contentions which were put forth in court during trial. Albeit that it may be unfavourable against the plaintiff, but it is surprising that the plaintiff made no attempt at all to provide justification or even an inkling of reconciliation to their contention.

F The following are the contentions which were instead raised by the first defendant (at length) which was not addressed or to an extent abandoned by the plaintiff:

G (a) the plaintiff does not have proof that they claimed for payment directly to the first defendant as principal rather than MILS (see the first defendant's written submission, p 80);

H (b) the plaintiff vide its own letter dated 7 July 2008 admitted that MILS is the party making payment for their services (see the first defendant's written submission, pp 80–84); and

(c) the plaintiff itself made claims for payment against MILS rather than the alleged principal, the first defendant (see the first defendant's written submission, pp 84–87).

I [98] And it must be further noted that even in the plaintiff's reply against the first defendant's submissions the plaintiff never bothered and eschewed from even attempting to justify or reconcile the above contentions.

THE PLAINTIFF DOES NOT HAVE PROOF THAT THEY CLAIMED FOR PAYMENT DIRECTLY TO THE FIRST DEFENDANT AS PRINCIPAL RATHER THAN MILS (SEE THE FIRST DEFENDANT'S WRITTEN SUBMISSION, P 80)

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[99] As correctly pointed out by the first defendant and as admitted by Dr Awad in his own evidence, the plaintiff against its own contention that they had claimed for payments directly against the first defendant, had instead admitted to not having proof of this contention. The relevant portions of the cross-examination are reproduced below:

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MFm: We heard that. My question is if you would care to listen. Maybe you could answer it. My question is, having not been paid for your services rendered, as you claim now in court. For 2008, I provide my transportation services, I was not paid. Surely you would have at least written a letter to MILS or to PDB saying I have not been paid.

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AWAD: I submit claim to Petronas. I submit the claim.

D

MFm: Where is the evidence of your claim submitted to Petronas or PDB, I want to see?

AWAD: It's a claim submitted to Petronas.

E

MFm: Where is it?

AWAD: I don't have it with me.

MFm: *You don't have it. Neither do you have any letters as you claim now you have not been paid; neither do you have any letters you wrote to MILS or PDB saying that you have not been paid.*

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AWAD: *Well, I don't have it here with me really.*

MFm: *You don't have it with you?*

AWAD: *No.*

G

[100] The above excerpt of the cross-examination plainly shows that the plaintiff has no proof at all that it has made claims against the first defendant for payments as a supposed principal to the agreement. The fact that this was not addressed at all even in the plaintiff's reply further supports the plausibility of the first defendant's contention that MILS is not its agent, at least in this respect.

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THE PLAINTIFF VIDE ITS OWN LETTER DATED 7 JULY 2008 ADMITTED THAT MILS IS THE PARTY MAKING PAYMENT FOR THEIR SERVICES

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[101] It was submitted by the plaintiff that the plaintiff in its own letter to the first defendant dated 7 July 2008 had admitted that MILS is the party who

- A makes payment to the plaintiff for its services. Here, the first defendant draws a glaring contradiction between the testimony of Dr Awad and the plaintiff's letter dated 7 July 2008. On one hand, Dr Awad's testimony was that claims for payment were made directly against the first defendant, Petronas, but on the other hand, the plaintiff's own letter admitted that payment should be made by MILS instead. Indeed, the contradiction is glaring. The admission that MILS was the supposed party making the payment in the letter reads.

Now that *we are under the flagship of MILS* perhaps with the same structure except with a different smell. It is indeed stinking as to date *MILS have not been able to pay us in time ...*

- C It seems and it appears that ... and *because of MILS incompetence we are somewhat getting paid now between 45 days and some extent 90 days.* (Emphasis added.)

- D [102] The discrepancy is obvious. It is utterly devoid of logic and reason since the plaintiff asserts that it claims directly to the first defendant as principal (which they admitted to have no proof of) and instead admits that payment is expected to be made by MILS, and the duty to pay is borne against MILS.

- E [103] Again, this contention was not addressed at all in the plaintiff's submissions and reply submissions against the first defendant's submissions.

- F THE PLAINTIFF ITSELF MADE CLAIMS FOR PAYMENT AGAINST MILS RATHER THAN THE ALLEGED PRINCIPAL, THE FIRST DEFENDANT (SEE THE FIRST DEFENDANT'S WRITTEN SUBMISSION, PP 84–87)

- G [104] In the same letter, the first defendant submits that it is telling that against the plaintiff's contention that claims for payments was made to the first defendant, the fact that the plaintiff in its own letter admitted to expect payment from MILS is proof that the plaintiff must have instead claim against MILS and not the plaintiff.

- H [105] Indeed, logically and reasonably so, the only reason that the plaintiff admittedly expects payment from MILS is because the plaintiff has made claims against MILS.

- I [106] We do agree with the first defendant, that this court ought to take Dr Awad's testimony with caution. The contradictions are clear and were not addressed in the plaintiff's own submissions.

The court's preliminary finding

[107] Thus, in consideration of the above submissions and evidence, it is ultimately compelling that MILS is never at all material times the agent of the first defendant. A

[108] The contemporaneous documents (inclusive of the plaintiff's own letter dated 7 July 2008, and the MILS contract) together with the express conduct of the plaintiff above, draws the compelling conclusion that MILS is not an agent and are mere independent contractors of the first defendant. The plaintiff had conducted itself in the business and contract in this understanding. B

[109] And the plaintiff herein, is estopped to now deny the above. The court is again guided by the Federal Court's decision in the *Boustead* case referring to Lord Denning's decision. C

Was MILS validly replaced as transportation manager subsequent to the second defendant's withdrawal? D

[110] Now, it is plain that even the aforementioned finding would find the issue herein is in the affirmative. The plaintiff itself admitted to have been 'under the flagship of MILS' in its own letter. Not only that, it had admitted that MILS is the party to pay for its services and not the first defendant. E

[111] However, the court is of the view that the defendants' further contention on the validity of the MILS' appointment must be addressed for the sake of completeness. F

[112] It is the submission of the plaintiff that it has strenuously and continuously objected to the MILS' appointment. The plaintiff has afforded a few grounds supporting this contention namely that: G

- (a) the plaintiff never admitted and acknowledged MILS' appointment as the new transportation manager replacing the second defendant; and
- (b) the second defendant has failed to prove that it has withdrawn from its services as transportation manager. H

[113] Nevertheless, the defendants have forwarded to court, an abundance of evidences by documentary proof and of the plaintiff's conduct to reveal a totally opposite conclusion against the plaintiff's contention here. I

A PLAINTIFF HAS RECEIVED AND HAS NEVER OBJECTED AGAINST THE APPOINTMENT LETTER

B [114] The first defendant submitted that the plaintiff itself had admitted to accepting to the letter notifying of MILS' appointment dated 30 January 2008 by the first defendant and not forwarding even a single response or objection against that letter. The appointment letter clearly reads:

C Merujuk kepada perkara di atas, dukacita dimaklumkan bahawa pihak Konsortium Logistik Berhad (KLB) telah menarik diri dan tidak menerima tawaran kontrak tersebut di atas.

Sehubungan itu, pihak PETRONAS Dagangan Berhad (PDB) dengan in telah melantik MISC Integrated Logistics Sdn Bhd (MILS) sebagai Kontraktor Utama untuk mengurus syarikat tuan mulai 1 hb Februari 2008. (Emphasis added.)

D [115] And the plaintiff's witness Dr Awad has admitted to accepting the appointment letter and not responding to it at all.

E MFM: Yes, Thank you. Now, my next question having said that you are unhappy, fearful of losing money, having no choice, fearful of breaking your contract with KLB which you say is still continuing, did you write a single letter either to KLB or MILS or Petronas, or PDB rather, in response to this letter dated 30.1.2008?

AWAD: Counsel, I am going to.

F MFM: Just answer my question please

AWAD: I am going to answer you. I am going to answer you, ok.

MFM: Did you write a single letter?

AWAD: I didn't

G MFM: Either to PDB or MILS or KLB, in reply to this letter dated 30.01.2008?

AWAD: I didn't write a letter, but I refused to sign the contract.

H THE PLAINTIFF NEVER COMPLAINED OF MILS' APPOINTMENT AT LEAST FOR SIX MONTHS AFTER MILS' APPOINTMENT AND BEFORE ITS LETTER DATED 7 JULY 2008

I [116] The first defendant had also submitted that for at least six months after the appointment was made, the plaintiff had never even once written in protest against the appointment.

[117] Dr Awad himself admitted during cross-examination the following:

MFM: So the point that I, to the question that I was asking just now, prior to 07.07.2008, six months preceding that right, there is not a single letter to PDB or MILS or KLB complaining about either the role of MILS or the non-payment to the Plaintiff or any such complaint? **A**

AWAD: No. **B**

[118] It is apparent that the plaintiff has never expressed any qualms against the appointment of MILS and had continued to procure services per usual.

THE PLAINTIFF OPTED TO CONTINUE WITH BUSINESS PER USUAL AFTER MILS APPOINTMENT **C**

[119] The second defendant alluded to Dr Awad's cross-examination reproduced below where he has admitted to continue to provide services even after MILS' appointment: **D**

MFM: So, you made a choice, Dr Awad, to carry on because otherwise it would cost you a lot of money?

AWAD: Because, as far as I concerned.

MFM: Answer my question, please. **E**

AWAD: Sorry

MFM: So you made a choice to carry on because otherwise it would cost you a lot of money. **F**

AWAD: Yes, to make it ...

MFM: But what you did instead Dr Awad, or rather what the Plaintiff did instead was to carry on its business as usual.

AWAD: With my principal **G**

MFM: Doesn't matter with who. Plaintiff carried on the business as usual.

AWAD: Yes, with my principal.

[120] Considering the above excerpt, as had been found earlier, the first defendant is never the principal of the plaintiff. Thus, when the plaintiff admitted to continue to give services, it means that the plaintiff had provided services to MILS. The misconceived assumption by the plaintiff is irrelevant and does nothing to defeat the fact that the plaintiff admitted to have continued to carry on business as per usual even after MILS' appointment. **H**
I

A THE PLAINTIFF ADMITTED TO RECEIVE INSTRUCTION FROM MILS

B [121] Despite the plaintiff's staunch yet tenuous contention that it has never approved of MILS' appointment, it is peculiar to note that Dr Awad had instead admitted to have taken instructions from MILS.

ATW: So, despite me asking you and you confirmed that you do not take instructions nor correspond with MILS, or you don't have. Yes or no only. Do you take instructions from MILS?

C YA: No. Mr Arthur, you just let him answer, have you ever written letters to MILS. That's it.

AWAD: Yes, after April we take instructions from them.

D YA: Yes

AWAD: After April 2008.

YA: Ok. The answer is yes.

E [122] The second defendant's case is absolutely on point in pointing this admission out. Clearly, the plaintiff acknowledged the authority of MILS. Otherwise, it would have not accepted their instructions.

F THE PLAINTIFFS ADMISSIONS IN ITS LETTER IN RESPONSE TO SUSPENSION DATED 7 JULY 2008

G [123] Both of the defendants have contended on this letter. A plain reading of this letter unravels a line of admissions that the plaintiff has indeed acknowledged MILS as the new transportation manager replacing the second defendant. The relevant excerpts of the letter are discussed below:

(a) firstly, the plaintiff themselves admitted that they are now under the management or 'flagship' of MILS;

H *Now that we are under the flagship of MILS perhaps with the same structure except with a different smell.*

(b) the plaintiff also admitted that MILS is expected to pay them for their services;

I It is indeed stinking as to date MILS have not been able to pay us in time ...

(c) upon the plaintiff's admission on expecting MILS' payment, it is reasonable to infer that the plaintiff submits its claim to MILS and not to the first defendant as alleged principal.

THE PLAINTIFF'S ACKNOWLEDGMENT OF MILS' AUTHORITY IN ITS LETTER DATED 11 JULY 2008 (SEE BUNDLE B2, P 31) A

[124] This letter was issued by the plaintiff in reply of MILS's letter for compliance of the four conditions by the plaintiff. However, a plain reading of the letter would reveal that the plaintiff was docile and was never in protest of MILS's authority to impose such conditions. The plaintiff has even considered and appealed for alternatives and decision from MILS. The plaintiff wrote: B

As such we appeal for a well thought through decision and choices and fair policies as we are a vendor for the national oil company and would contribute for the nation and out growth with the help of your organisation. (Emphasis added.) C

THE PLAINTIFF ADMITTED THAT IT HAS NOT WRITTEN ANYTHING TO PROTEST THE AUTHORITY OF MILS TO SUSPEND THEIR SERVICES D

[125] It was submitted by the first defendant, and was never addressed by the plaintiff in their reply, that Dr Awad has during cross-examination, admitted to have not written anything to protest MILS' authority to suspend their services upon receiving the letter of suspension. The excerpt of the cross-examination is as follows: E

- MFm: Yes, ok. So even when you received this letter for suspension by MILS, you did not challenge MILS' authority to suspend the Plaintiff? F
- AWAD: I had nothing to do with them.
- MFm: You had nothing to do with them?
- AWAD: I have nothing to do with MILS. I don't have any problem.
- MFm: And did you write to them to tell them that you had nothing to do with them? G
- AWAD: Well, you see the suspension on the 13.06.2008.
- MFm: Did you write to them to tell that you had nothing to do with them?
- AWAD: I didn't write to them because even they have not signed contract yet. They signed contract on 11.07.2008 and they suspend me even before that. H
- MFm: *Dr Awad, did you write to them to tell them you have nothing to do with them.* I
- AWAD: *I didn't write to them. I didn't write to them, no. I didn't write to them.*

The court's finding

A [126] The plaintiff vehemently submitted that the second defendant was not validly replaced by MILS.

B [127] In arguing this contention, the plaintiff had spawned arguments as to the failure of the second defendant to prove that there was any withdrawal by them. And that the second defendant had failed to prove that the withdrawal was given consent by the plaintiff.

C [128] All along the plaintiff also conjured some arguments that the second defendant cannot submit evidences as they had opted to not lead evidences. This was mainly the reply of the plaintiff against the second defendant's submission.

D [129] However, against the same contention, this court would ask this rhetorical question. If on the same argument the plaintiff objects to the evidences of the second defendant, how could the plaintiff then, in its venture to prove the principal-agent relationship, relies upon the evidences of the second defendant in its affidavit? Surely that would be unjust. The plaintiff cannot be allowed to simply opt to use an argument while denying the defendants to adopt a similar argument.

F [130] Nevertheless, even assuming that the second defendant retains no right to put forth some of their arguments, the evidences from contemporaneous documents, (being the plaintiff's own letters dated 7 July 2008 and 11 July 2008), admissions of Dr Awad in its testimony and the overall conduct of the plaintiff lacking in any form of protest in fact, conducting themselves in support of the appointment of MILS (in continuing to provide services) draws the sublimely overwhelming inference and conclusion that, parties have continued to deal in their business with a common understanding that MILS is and was at all times a valid replacement to the second defendant.

G [131] And on the same authority of the *Boustead* case, the plaintiff is now estopped from denying this state of understanding.

H [132] Thus, it is in the court's view that MILS was rightfully appointed to replace the second defendant. The services of the second defendant were put to an end and its roles and standing was replaced with that of MILS.

I *Breaches not attributable to the defendants*

[133] Now, it entails from the earlier findings, namely:

- (a) MILS is not agent to the first defendant and is merely an independent contractor;

- (b) MILS was validly appointed and has replaced the second defendant in its role and standing; and A
- (c) the second defendant's services is validly terminated and replaced with MILS that assuming, that even hypothetically there is any breach of the Sri Awad agreement, *by no means at all that the breach is attributable to any of the defendants.* B

[134] With the finding that MILS is rightfully appointed and acknowledged by the plaintiff as subcontractor of MILS, there is no room at all to link any breaches (if any) to any of the defendants. C

[135] It was already found that it was MILS who had suspended and terminated the plaintiff's services in its own stead and none others. Thus, any breach of the Sri Awad agreement, is the personal liability of MILS and not any time the defendants'. D

[136] The plaintiff has sued the wrong parties in this action.

[137] Thus, the failure to bring MILS as a party to the dispute is fatal to the plaintiff's case. E

[138] Nevertheless, for the sake of completeness, the court will allude to the breaches alleged but only on the pretext of MILS' liability and not the defendants'. F

THERE WAS NO NOTICE OF TERMINATION OF THE SRI AWAD AGREEMENT BY THE SECOND DEFENDANT AS PROVIDED UNDER CLAUSES 8.1, 8.2 AND 8.3 OF THE SRI AWAD AGREEMENT (SEE BUNDLE B1, PAGES 217 219) THUS, ALLEGEDLY THE SRI AWAD AGREEMENT REMAINS SUBSISTING G

[139] Now, the first defendant first submitted against this contention that the propriety of the notice of termination is non-issue in this dispute as it was not the pleaded case of the plaintiff. And the court agrees. The plaintiff had specifically and meticulously specified and particularised the manner of breaches of the Sri Awad agreement. And there was never a single mention of cl 8 and/or its sub-clauses. The plaintiff never pleaded that the notice of termination was improper. The plaintiff's pleadings are reproduced below (see Bundle A, p 37): H

PARTICULARS OF THE WRONGFUL TERMINATION OF THE PLAINTIFF'S SERVICES BY THE FIRST DEFENDANT (OR IN THE ALTERNATIVE BY THE SECOND DEFENDANT) UNDER THE FIRST CAUSE OF ACTION I

A First Defendant (or in the alternative by the Second Defendant), had failed and/or neglected in the following:

- (a) Failure to stop MILS, whom at all material times was acting as an agent to the First Defendant, from suspending the Plaintiffs services.
- B** (b) Failure to withdraw all suspension of services done by the said MILS, whom at all material times was acting as an agent to the First Defendant, albeit knowing that the suspension was wrongfully done.
- (c) Failure to adhere to Clause 11.5 of the Main Agreement which MILS, whom at all material times was acting as an agent to the First Defendant,
- C** when terminating the Plaintiff's services under the accident issue as stated in paragraph 12 above.
- (d) Failure to consider all the practical efforts taken by the Plaintiff as stated in paragraph 12 above.

D [140] It is apparent that the plaintiff had even taken the liberty to identify the clause in which the plaintiff intends to rely upon (cl 11.5). And it is clear that the propriety of the notice of termination under cl 8 is not included in the particulars of breach. Thus, the court's hand is in a bind and the court cannot

E discuss an issue which was not pleaded.

[141] Thus, as the notice of termination remains unchallenged, what are left to be discussed are only the grounds which forms the spine of the termination.

F THERE WAS NO JUSTIFICATION FOR THE TERMINATION OF THE SRI AWAD AGREEMENT BY THE DEFENDANTS

[142] Now, it was vehemently submitted by the plaintiff that MILS or the defendants retains no right to terminate the Sri Awad agreement. The plaintiff

G placed heavy reliance on cl 11.5 of the Sri Awad agreement:

11.5 The Contractor shall terminate the employment of its driver who commit one or more of the following offences: ...

H [143] However, this court finds that reliance on the above cl 11.5 is verily an inaccurate application of the Sri Awad agreement with the given facts of the case.

I [144] The reason being that cl 11.5 is specific to the termination of drivers of Sri Awad in the event one of the long line of offences was committed by the driver(s).

[145] However, the present case at hand does not deal with the termination of

the driver at all *BUT THE TERMINATION OF THE CONTRACT (SRI AWAD AGREEMENT) ITSELF* A

[146] Hence, the proper clause to be applicable would be cl 8 of the Sri Awad agreement which governs the terms for termination of the contract. B

[147] And in agreement with the first defendant's submission that the proper litmus test on the justifiability of the termination by MILS is to apply cl 8 of the Sri Awad agreement, particularly cl 8.1(d) (see Bundle B1, p 218):

8.1 Notwithstanding other provision in the Contract and without prejudice to any other remedies, which the Company may have against the Contractor, the Company has the right to terminate this Contract at any times by giving (30) days prior notice in writing to the Contractor in the event: ... C

d. The Contractor is prevented from any cause whatsoever or fails to perform his obligations under this Contract due to the acts, omission or negligence of its employees, servants or agents;or D

[148] Now, in the present case, the drivers of the plaintiff were involved in two separate accidents which caused fatalities and also losses to the MILS. Indeed, in the meaning of the clause above, the plaintiff 'fails to perform his obligations'. E

[149] The plaintiff themselves, upon the first fatal accident had already admitted that it is caused by the negligence of its drivers: F

MFM: And could I see the findings by the Plaintiff into this accident? What did, you disagree with MILS report, but what is the Plaintiff's findings as to the cause of the accident? G

AWAD: *Accident is negligence on the driver's side.*

[150] While with regards to the second accident where it was caused by the plaintiff's driver deviating from the established route, the Dr Awad himself admitted that it was indeed a breach of the Sri Awad agreement: H

MFM: Yes, not without the authority of the company deviate from established route for unnecessary park, stop the vehicle. So my question is, based on this KLB agreement that the Plaintiff has been KLN, it is a breach of the agreement of the Plaintiff want to deviate from the established routes. It says that so, you know it says so that. I

AWAD: *I agree with you.*

- A [151] Now notwithstanding if the second accident is not admittedly a negligence, it does not defeat the admission that it is indeed a breach of the Sri Awad agreement.
- B [152] And even for a moment, assuming that the second accident is not a ground to terminate the Sri Awad agreement (which the court finds it is), the first accident is reported and is admitted to be caused by the plaintiff's driver's negligence. And on that basis alone, MILS is justified to invoke cl 8.1(d) of the Sri Awad agreement to terminate the agreement with the plaintiff.
- C THE DEFENDANTS HAS BREACHED CLAUSE 6 OF THE SRI AWAD AGREEMENT AS THE MINIMUM CONTINUOUS CONTRACTUAL PERIOD OF EIGHT YEARS WAS NOT ADHERED TO
- D [153] The court shall only allude to this contention by the plaintiff very briefly as the literal reading of the contract suffices to unravel the misinterpretation afforded by the plaintiff. The court sees no rhyme or reason to deviate from such a clear and succinct clause in the Sri Awad agreement, namely cl 6. The clause reads:
- E 6.1 Unless terminated earlier in accordance with the provision of this Contract, this Contract *shall expire after a period of four (4) years from the Commencement dated* (hereinafter referred to as the 'Initial Period')
- F 6.2 At the end of the Initial Period, the parties may agree in writing to *extend to the Contract for a further two (2) years (hereinafter referred to as 'Extended Period 1') and thereafter for a further two (2) years (hereinafter referred to as 'Extended Period 2')* both of which, together with the Initial Period shall be referred to as the 'Contract Duration') upon terms and conditions to be mutually agreed upon ... In the event either party wishes to extend the Contract for either Extended Period 1 or Extended Period 2 or both, the requesting Party shall notify the other Party of their intention to do so six (6) months before the expiry of the Initial Period or the Extended Period 1, as the case may be.
- G
- H [154] In plain sight and beyond a single shade of doubt, the clause never mention of an 'automatic' term of eight years. It is clear as day that the contract expires after four years with an opportunity to extend twice, the term of two years.
- I [155] And against this automatic term of eight years, it is at this point unsurprising that the plaintiff itself has admitted against this contention and admitted that the contract expires after four years. This is blatantly apparent in its letter dated 7 July 2008 (see Bundle B3, p 42):
- The setting up of Sri Awad is also for the owners to manage the transport business on bigger scale. *Earlier SE (Sri Enterprise) had entered into a second fresh agreement*

with KLB for dedicated transportation services of bulk petroleum products for a period of 4 years which ended September 30, 2007 with an option of renewal for another 4 years. The Contract is now subordinated to Sri Awad.

A

PLAINTIFF ADMITTED NON-COMPLIANCE TO THE
PROCEDURES OF EXTENSION

B

[156] On the same note, the clauses above briefly requires that in view of an extension, parties must first, have a written agreement to the extension(s)' effect and the party intending to extend must notify the other party six months before the Sri Awad agreement's expiration.

C

[157] On both requirements, Dr Awad, the plaintiff's witness had admitted that the plaintiff has not complied with both of the above requisites. The plaintiff neither has a written contract for extension nor any request for extension six months before expiration (see NOE Vol 1, 12 November 2014, p 158):

D

FMD: The Second Defendant. Okay, so they promised to give to you. So before this court, we do not have an agreement in writing to extend the contract, agreed?

E

AWAD: Yes.

FMD: Okay. Neither do we have a request either by KLB or by Plaintiff six months prior to the expiry, to extend the contract.

AWAD: Yes, they agree.

F

FMD: No, is there a request? You see, the agreement says the requesting party shall notify the other party of their intention to do so six months before the expiry of the initial period or the extended period, as the case may be. So I just want to know whether there is such notification from either side – Second Defendant or Plaintiff as required under Section 6.2.

G

AWAD: No.

FMD: There is none, yes?

H

AWAD: Yes.

Issue (a) and (b) of the second cause of action shall be dealt together.

(a) Was there a contract of supply of tankers between the Defendants and the Plaintiff?

I

(b) Was there a breach of the alleged contract of supply of tankers by the Defendants?

A [158] Briefly, the plaintiff's second cause of action is that the defendants (more specifically the second defendant) had offered the plaintiff and breached an agreement for the manufacturing and supply of a number of tankers for the purpose of transporting the first defendant's petroleum products.

B [159] From the outset, it must be noted that there is no physical written contract of the alleged order agreement. The order agreement is submitted to be derivative of a line of correspondences, which led to the plaintiff to manufacture the tankers (allegedly).

C [160] Throughout the trial, there are three fundamental documents in court which was submitted by the parties to the dispute. Those documents being:

D (a) the second defendant's *Tawaran Kemasukan Lori Tangki Baru – Penggantian* dated 15 December 2004 (ref No BLDD/TGL/29/12/04) ('letter of offer') (see B1, pp 1–2);

E (b) the plaintiff's letter to the second defendant dated 31 January 2005 referring to the plaintiff's letter no BLDD/TGL/29/12/04 ('rejection letter') (see Bundle B2, p 43); and

(c) the second defendant's letter dated 8 February 2005 ('rejection confirmation letter') (see Bundle B1, p 3).

F [161] Now, the plaintiff's submission is that, based on the second defendant's letter of offer, the plaintiff had went out of their way to manufacture and pay the deposit for the tankers and had even entered into a hire purchase agreement with the MIDF pursuant to the letter of offer. Thus, when the defendant's refused to accept the tankers and refused payment, the defendants have breached the order agreement and caused losses to the plaintiff.

G THE PLAINTIFF'S REJECTION LETTER DATED 31 JANUARY 2005

H This court takes notice of the fact that this rejection letter is mistakenly dated 31 January 2004. However, this has been explained to be a typo error during trial.

[162] Now, despite the plaintiff's submission above, the contemporaneous documents put in court seems to deem the plaintiff's submission not even the least plausible or probable.

I [163] Specifically in reference to the plaintiff's own rejection letter. The second defendant's submission is that there is no ground at all that the plaintiff would put itself in that detriment alleged as the plaintiff itself has made it clear that it rejects the second defendant's offer letter.

[164] Now, against the second defendant's reliance on the plaintiff's rejection letter, the plaintiff submits that the second defendant had misconstrued the letter merely because there were no such words of 'unable to accept the offer'. A

[165] The court highlights here that there is no law, even to the farthest stretch of the legal imagination that stipulate that an offer can only be rejected using the words 'unable to accept the offer'. As long as any statements, is to the effect of rejecting the offer, it is a rejection. B

[166] The rejection letter could not be clearer. Firstly, the letter's reference clearly refers to the second defendant's offer letter. It is written in the top right corner of the letter underneath the particulars of the receiver: '*Reference BLDD/TG/29/12/04*'. C

[167] The second defendant's offer letter's reference number is indeed BLDD/TG/29/12/04. There is not a single shade of doubt that the rejection letter refers to the offer letter. D

[168] Even the opening paragraph of the letter writes:
Thank you for the confidence in our company on above offer E

[169] And in effect of the plaintiff's rejection, the plaintiff itself wrote:
We advise you that we had several discussion and negotiation with RJ Was Link Sdn Bhd. However, *we regret to inform that we are unable to reach an amicable agreement to proceed with arrangements made by Konsortium Logistik Berhad vide your letter dated December 15, 2004.* F

[170] It is immensely obvious that the plaintiff was unable to reach an agreement. When an agreement could be reached, then it entails that there is never any agreement. The plaintiff's contention against this letter therefore, fail and devoid of any legal and/or factual reasons. G

THE SECOND DEFENDANT'S REJECTION CONFIRMATION
LETTER DATED 8 FEBRUARY 2005 H

[171] This letter was issued by the second defendant in reply to the plaintiff's rejection letter. The content of the letter is nothing short of clarity. It clearly refers to the rejection letter dated 31 January 2005 and the offer's reference number: I

Per: Tawaran Kemasukan Lori Tangki Baru – Penggantian

Surat tuan BLDD/TGL/29/12/04 bertarikh 31hb Januari 2005 berhubung perkara di atas dirujuk.

A Kami dengan ini *mengesahkan bahawa syarikat tuan telah menolak tawaran kemasukan penggantian lori tangki yang dikeluarkan oleh KLB pada 15hb Disember 2004* melalui surat tuan di atas. Maka dengan ini *tawaran yang dikemukakan tersebut dibatalkan* dan KLB berhak menawarkan penggantian ini kepada kontraktor lain.

B

THE PLAINTIFF'S WRONGFUL RELIANCE TO THE OFFER LETTER

C [172] Now, in the last bid to salvage this failing contention, the plaintiff submitted that notwithstanding the plaintiff's own rejection letter in the year 2005, the plaintiff had already paid deposits over the tankers in 2004. The deposit was paid on the supposed reliance on the content of the offer letter which reads:

D Walaubagaimanapun sekiranya tiada apa-apa tindakan susulan untuk membeli lori tangki tersebut sehingga *01hb Mei 2005*, maka tawaran ini akan dengan sendirinya terbatal

E [173] However, a plain reading of the plaintiff's contention would reveal that the contention is not even logical in its timeline. It goes beyond any logical reconciliation and reason that firstly in the year 2004, the plaintiff took steps to pay deposits for the tankers pursuant to the offer and subsequent to the alleged payments, in the year 2005 *AFTER* the payment, the plaintiff suddenly opted to reject the offer and was unable to reach an agreement.

F [174] It is undoubtedly clear that the plaintiff cannot make any logical reconciliation to this utterly illogical alleged turn of events. The plaintiff's contention here completely and utterly fails.

G *The court's findings*

H [175] The plaintiff had utterly failed to prove any existence of an agreement for the supply of tankers. The testimonies and contemporaneous evidences discussed above divulge the undeniable conclusion that the plaintiff themselves had rejected and cancelled the second defendant's offer. Thus, there was no agreement to begin with.

I [176] Therefore, there is never any breach of the non-existent agreement as fallibly contended by the plaintiff.

[177] The court is again guided by the Court of Appeal decision in the case of *Lee Ing Chin* and also the case of *Boustead* that the plaintiff should be estopped from denying the fact that the plaintiff itself has rejected the offer letter and has never entered in the agreement with the second defendant.

The court's decision and order as to costs

A

[178] The court therefore, dismisses all of the plaintiff's claims in this action and therefore, dismisses the plaintiff's action.

[179] Having heard brief submissions from counsels for the plaintiff, the first defendant and the second defendant, this court hereby orders that the plaintiff to pay each of the defendants costs of RM50,000 amounting to a total of RM100,000.

B

Plaintiff's claim dismissed.

C

Reported by Ashok Kumar

D

E

F

G

H

I